Conversation Contents

Bears Ears

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Downey, see attached. Please treat as draft only. We should speak again before completion of the additional materials.

Tony

National Monument Diminishment Analysis

Legal and Factual Analysis Supporting a Diminished Bears Ears National Monument Proclamation and Boundaries

June 4, 2017

A legal and factual analysis of the Bears Ears National Monument ("Present Monument"), Proclamation 9558, *Establishment of the Bears Ears National Monument*, 82 Fed. Reg. 1139 (Dec. 28, 2016) ("Proclamation") was undertaken to identify a legally defensible diminishment of this national monument to ensure the area reserved is consistent with the Antiquities Act. One option to meet the objectives of the Antiquities Act while actually enhancing the protection of the special resources in the Bears Ears region includes creating a diminished monument boundary ("Diminished Monument") coupled with increased enforcement of existing laws and a mineral withdrawal ("Mineral Withdrawal") in significant areas in the greater Bears Ears region. Such a diminishment would be consistent with the Antiquities Act's requirement that reservations "be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b).

The Proclamation was ostensibly intended to protect Native American ancestral Puebloan sites and to preserve certain lands for traditional Native American spiritual, cultural and domestic uses. To a large degree it fails, whereas a monument diminished in size accompanied with greater enforcement of existing laws would be successful in achieving the stated goals. A diminished national monument is legally appropriate and will, as discussed below, more adequately protect culturally important resources than will the present landscape monument. First, national monument designations bring with them a significant increase in public visitation and a concomitant increase in the risk for damage and vandalism to archaeological sites. Second, removing land from the Bears Ears National Monument reservation and directing visitors to smaller areas capable of physical protection will help protect the archaeological resources in the larger area by holding down access and visitation to those sites outside of a diminished monument. Third, a diminished monument managed by the National Park Service will allow the BLM and Forest Service to direct their limited resources to increasing enforcement of existing laws rather than developing new management plans and facilities. Finally, a diminished national monument will allow resources to be properly conserved and actively managed to address wildfire, invasive species, biodiversity, climate change, and other resource concerns in the larger area.

From a legal perspective, a diminished national monument is more legally defensible than a larger landscape national monument. First, the Antiquities Act was not intended to apply to scenery and landscapes, and discussion during its consideration and passage expressly stated that it would not be used to tie up millions of acres of land. By designating a landscape scale monument, the Proclamation creating the Bears Ears National Monument exceeded the authority delegated to the president by the Antiquities Act. Second, the Proclamation identifies items that, if they are intended to be national monument objects, are outside the scope of the Antiquities Act because they are not objects of historic and scientific interest, are intangible, are common, are not connected to the land, are not deemed to be of scientific interest by the relevant scientific communities, or are too large to have been within the contemplation of the act as originally written. Third, the Present Monument is a landscape monument that is outside the scope of the Antiquities Act's original intent in that its sheer size alone will result in harm to the very archaeological resources it purports to protect. Fourth, the reservation of the Present Monument is not the smallest area compatible with the proper care and management of monument objects because other laws already protect the legitimate objects identified in the Proclamation. Fifth, the locations of many items identified in the Proclamation are unfixed or unknown, rendering unjustified and unsupportable a large reservation of land for their care and management. Finally, Congress did not repeal the *Midwest Oil* reservation doctrine only to allow a larger, unconfined reservation authority to remain in the Antiquities Act.

The diminished national monument should allow visitation of identified sites that are of interest to monument visitors but be limited to an area where archaeological resources can be physically protected to prevent desecration and vandalism to the antiquities. For resource protection and public safety concerns, the monument should also be designated in an area where appropriate facilities, such as parking lots, restrooms, and camping areas, can be provided. To address concerns regarding mineral exploration, development, and extraction activities, the diminished national monument reservation should be accompanied by a mineral reservation of a larger area.

I. Legal Analysis and Theory

1. The Antiquities Act Was Not Intended to Apply to Scenery and Landscapes.

"[I]t is a national policy to preserve for public use historic sites buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 54 U.S.C. § 320101. "The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). Accordingly, "[t]he President may reserve parcels of land as part of the national monuments." 54 U.S.C. § 320301(b). "The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b).

"The Antiquities Act of 1906, 16 U.S.C. § 431, gives the President authority to create national monuments." *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1176 (D. Utah 2004). "The Antiquities Act authorizes the President, 'in his discretion,' to establish as national monuments 'objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States." *Id.* (quoting 16 U.S.C. § 431). "The Antiquities Act constitutes an express, broad delegation of authority to the President" and "'permits the President, "in his discretion," to create a national monument and reserve land for its use simply by issuing a proclamation with respect to land "owned or controlled by the Government of the United States."'" *Western Watersheds Project v. Bureau of Land Management*, 629 F. Supp. 2d 951, 963 (D. Ariz. 2009) (quoting *United States v. California*, 436 U.S. 32, 40 (1978)).

The text of the Antiquities Act plainly shows that designations should be limited in size and not encompass large landscapes. The Antiquities Act states: "The limits of the parcels shall be *confined to the smallest area* compatible with the proper care and management of the objects to be protected."[1] The Antiquities Act also implies that size should be small by using the term "parcels," stating, "[t]he President may reserve parcels of land as part of the national monuments."[2] The Antiquities Act shows a clear objective of protecting discrete historical and archaeological resources rather than landscapes, stating: "The President may, in the President's discretion, declare by public proclamation *historic landmarks*, *historic and prehistoric structures*, and other objects of *historic* or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments."[3]

The legislative history leading to the Antiquities Act shows that it was not intended to apply to scenic vistas and was not intended to give the President authority to designate large landscapes as national monuments. Early versions of the bill would have allowed for reservations of land for their scenic value or the reservation of natural wonders or curiosities, but the focus of the bill that was eventually enacted was to protect archaeological objects. Prepared and promoted by an archaeologist,

[1] 54 U.S.C. § 320301(b) (emphasis added).

[2] 54 U.S.C. § 320301(b).

[3] 54 U.S.C. § 320301(a) (emphasis added).

Dr. Edgar Lee Hewett, the final version was proposed in both the House and the Senate and passed without amendment.[4]

From the outset, the size of the reservations was an issue, with westerners opposing expansive language based upon the west's experience with, and opposition to, vast forest reservations by presidential order.[5] The scope of Antiquities Act authority, as it related to size, was a significant concern and point of disagreement during prior versions of the bill. During floor discussion regarding the bill, the following exchange occurred between two Congressman, evidencing that the bill's limiting language was intended to have purpose and effect:

> Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill?
>
> Mr. LACEY: Not very much. The bill provides that it shall be the smallest area necesstry [sic] for the care and maintenance of the objects to be preserved.
>
> Mr. STEPHENS of Texas: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?
>
> Mr. LACEY: Certainly not. The objective is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses.[6]

In addition, the House report accompanying the bill noted that "'[t]he bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.'"[7]

It is important to note that, in addition to containing a provision limiting the size of monument reservations, the final bill omitted language that would have allowed for scenic reservations. Early proposals for the Antiquities Act included reservations to protect scenic vistas, but this language was removed before passage. In 1911, the Chief Clerk of the General Land Office addressed the creation of monuments, and expressed his understanding that the Antiquities Act did not extend to scenic vistas, stating:

> "I have at times been somewhat embarrassed by requests of patriotic and public-spirited citizens who have strongly supported applications to create national monuments out of scenery alone . . . The terms of the monument act do not specify

[4] *See generally* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 478-84 (2003); Ronald F. Lee, THE ANTIQUITIES ACT, Chapter 6 (1970).

[5] Lee, THE ANTIQUITIES ACT, Ch. 6.

[6] 40 CONG. REC. 7,888 (1906).

[7] H.R. Rep. No. 59-2224 (1906) (as quoted in *Hearing on the Archaeological Resources Protection Act of 1979; and the Frederick Law Olmsted National Historic Site*, Pub. No. 96-26, 142 (May 1, 1979)).

scenery, nor remotely refer to scenery, as a possible raison d'etre for a public reservation."[8]

Some have suggested that the failure of the final bill to contain a specific acreage limitation, such as earlier proposals of 320 or 640 acres, suggests that the President's ability to proclaim large monuments is not significantly limited by the terms of the statute so as to preclude the declaration of large monuments. Although it is true that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended," *Russello v. U.S.*, 464 U.S. 16, 23-24 (1983), the limiting language was not deleted, it was merely revised to allow more flexibility in designating the amount of land reserved. Nothing in the final bill or the discussion leading to its enactment suggests that the language limiting the size of the monument was to be without meaning or purpose.

2. The Bears Ears National Monument Exceeded the Scope of the Antiquities Act by Identifying Objects that are not of Scientific or Historic Interest

The Antiquities Act allows the President to declare "objects of historic or scientific interest" to be national monuments. Early national monument proclamations demonstrate that national monuments were intended to be discrete, easily identifiable, fixed objects situated on land with a reservation that is the smallest area compatible with the object's care and protection, not large scale reservations of land accompanied by an inventory of every item located on the land. This original intent needs to be observed, along with the express statutory language that sets forth the process for and limitations of reservations.

There are two requirements with which the President must comply when designating a monument under the Antiquities Act: (1) "designating, in his discretion, objects of scientific or historic value"; and (2) "setting aside, in his discretion, the smallest area necessary to protect the objects."[9] Scenic or landscape monuments were not within the scope of the authority delegated to the President. Initial drafts of the bill, which garnered opposition from Western representatives that were weary of large forest reservations, allowed the President to withdraw and reserve "any natural formation of scientific or scenic value of interest, or natural wonder or curiosity on the public domain together with such additional area of land surrounding or adjoining the same…" Another version likewise proposed allowing reservations of "public land, which for their scenic beauty, natural wonders or curiosities" merited protection. Scenic and landscape values, however, were omitted from the final version of the bill.

Although the Antiquities Act allows objects of "scientific interest" to be designated national monuments, several types of objects were not within the contemplation of the original drafters. Items

[8] Lee, THE ANTIQUITIES ACT, Ch. 8; *see also* Hal Rothman, AMERICA'S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION, Ch.5 (1989) (noting that General Land Office Commissioner attempted to persuade Congressman "that 'topographic conditions seem to offer nothing but scenery . . . and [the Antiquities Act] does not provide for the reservation of public land for the protection of scenery'") (citing GLO Commissioner Fred Dennett to Congressman Carl Hayden, 28 April 1913, NA, RG 79, Series 6, Proposed National Parks, Papago Saguaro, file O-32) (alterations in original).

[9] *Utah Ass'n of Counties v. Bush*, 316 F Supp. 2d 1172, 1183 (D. Utah 2004). As discussed above, there is a significant question regarding whether the size of the monument is committed to the President's discretion.

outside the scope of the Antiquities Act include objects that are not objects of historic and scientific interest, are intangible, are common, are not connected to the land, are not deemed to be of scientific interest by the relevant scientific community, or are too large to have been within the contemplation of the act as originally written. Ambient items, which are intangible and not connected with the land, are not the type of discrete objects intended to be preserved by the Antiquities Act.

The Proclamation identifies hundreds of items that may be argued to be national monument objects by those seeking an expansive reservation. These items are mentioned in the first twenty paragraphs of the Proclamation. The items can be separated into eight different categories, including ambient items, archaeological/historical items, botanical items, cultural items, geological items, natural/habitat items, paleontological items, and wildlife items. Several categories of items are either improper national monument objects or do not require a reservation of land for their protection and management. Items that are not proper national monument objects include ambient items, botanical items, cultural items, natural/habitat items, and wildlife items.

Ambient items are improper objects because they are intangible and unconnected to the land. The Antiquities Act's reference to "objects" suggests the need for a tangible, discrete item capable of protection. In addition, the designation of the objects as national "monuments" suggests that they are in some way fixed to the land. The term "monument" is defined to include "[a]ny natural or artificial object that is fixed permanently in land and referred to in a legal description of the land."[10]

The vast majority of botanical, natural/habitat, and wildlife items mentioned in the proclamation are also improper national monument objects either because of their commonality, ubiquitous nature, unfixed location, or general lack of distinctive scientific or historic interest. Similarly, no reservation of land is necessary under the Antiquities Act for their care or protection. The Endangered Species Act prescribes the circumstances in which habitat may be designated and regulated for the benefit of the species and the state and federal agencies manage the wildlife pursuant to their respective authority, law, and regulations. Utah, under the terms of the original proclamation, retains authority over unlisted plant and animal species and does not require a reservation for their care or management. Through its land management processes, the BLM already protects habitat for the flora and fauna existing on its land.

Similarly, common plant and animal species and their habitat are improper items to identify as national monument objects because they are not of any particular scientific interest. Unlike the desert hole pup fish identified in the *Cappaert* decision, which were endemic to a single cave in the desert and are considered to be the rarest fish in the world, common species such as skunks, porcupine, elk, and deer are not within the contemplation of the Antiquities Act. Similarly, grasslands, woodlands, and riparian areas are not so uncommon as to be the type of scientific object intended to be protected by the Antiquities Act.[11]

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[10] *Monument*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[11] Although certain plants, animals, or their habitats may be proper objects, as discussed below, reservations of land should not be necessary because Congress has already specified the circumstances under which reservations of land may be made and already prescribed the means by which to protect those plants, animals, and their habitats.

3. The Original Bears Ears National Monument Violated the Antiquities Act's Requirement that Reservations be the Smallest Area Compatible With the Proper Care and Management of the Objects to be Protected.

The original reservation for the Bears Ears National Monument is not the smallest area compatible with the proper care and management of the objects because landscape monuments are outside the intent of the Antiquities Act as originally written; other laws protect identified objects, rendering unnecessary a large reservation of land for their care and management; the location of many objects is either unfixed or unknown; and Congress would not have repealed the *Midwest Oil* reservation doctrine only to allow a larger, unconfined reservation authority to remain in the Antiquities Act.

A. The Antiquities Act Requires the Identification of Objects First, Followed by an Appropriate Reservation of Land for Their Care and Management

The Antiquities Act allows the President to "reserve parcels of land as part of the national monuments," but limits these reservations to "the smallest area compatible with the proper care and management of the objects to be protected."[12] By its express terms, the Antiquities Act requires first that national monument objects be identified, followed by a reservation of land that is the smallest necessary to protect those objects. If the location of the objects is unknown, unsurveyed, or uninventoried, then a reservation of land for their care and management is inappropriate. The Antiquities Act does not allow for the drawing of an arbitrary boundary followed by a description of whatever items may be located on the land.

The Antiquities Act allows the President to "reserve parcels of land as part of the national monuments," but limits these reservations to "the smallest area compatible with the proper care and management of the objects to be protected."[13] By its express terms, the Antiquities Act prescribes an "inside out" approach. This means that the national monument objects must be identified first, followed by a reservation of land that is the smallest necessary to protect those objects. If the location of the objects is unknown, unsurveyed, or uninventoried, then a reservation of land for their care and management is inappropriate. The Antiquities Act does not allow for the drawing of an arbitrary boundary followed by a description of whatever items may be located on the land.

This "inside out" approach was used in early proclamations, but has been abandoned in recent years in favor of locking away large parcels of land. For example, Devil's Tower, the first national monument, is a singular monolith for which just over 1,000 acres was reserved. Other early monuments include El Morro national monument, which is a lone sandstone bluff containing inscriptions spanning hundreds of years; Montezuma Castle, which is a small area containing isolated Native American ruins; Chaco Canyon, a solitary canyon containing numerous large ruins; Cinder Cone and Lassen Peak National Monuments, which included two volcanic peaks, a lava field, and two lakes; and Gila Cliff Dwellings, which is a small area containing Native American ruins.

[12] 54 U.S.C. § 320301(b).

[13] 54 U.S.C. § 320301(b).

More recent designations, on the other hand, have used an "outside in" approach, which first identifies the area that various special interest groups would like to see designated as a monument and then catalogues every item that may potentially be located on that land, regardless of whether the location is known or fixed. This method of drawing the reservation first and then identifying what objects might exist within that reservation, is inconsistent with the Antiquities Act's express limitations and a gross abuse of the limited reservation authority that was granted.

Within Utah, the Antiquities Act has been abused to appease special interest groups seeking to preserve broad swaths of land rather than discrete objects of scientific or historic interest. The recent Bears Ears National Monument is a prime example of the outside-in approach adopted in recent years. Using boundaries largely borrowed from proposed legislation, the proclamation catalogues every item that may be located inside the monument, regardless of whether its location is fixed or known. Items identified in the proclamation include intangible qualities such as star-filled nights, natural quiet, and deafening silence and common plants and animals such as greasewood, sagebrush, mule deer, coyotes, and porcupines. Less than ten percent of the monument has been inventoried for archaeological resources, which have been showcased as the primary justification for the monument.

B. A Landscape Reservation is Inconsistent with the Original Intent of the Antiquities Act and Unnecessary for the Care and Management of Identified Objects.

For several categories of items mentioned in the Proclamation, a reservation of land is unnecessary for their care or management. Cultural items, such as sacred areas, do not need a reservation of land. Instead, a reservation may interfere with the use of these areas by inviting visitors or imposing restrictions on their use. A monument proclamation is not needed to recognize such activities or allow them to continue; if anything the proclamation may be used to inhibit or burden the exercise of religious freedoms. Moreover, Native American religious practices are protected by law and executive order. The American Indian Religious Freedom Act, 42 U.S.C. § 1996, provides that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." Similarly, Executive Order No. 13007 (May 24, 1996) provides that "[i]n managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."

Large numbers of visitors to sacred areas used to perform ceremonies may detract from or interfere with the ability to conduct the ceremony or the sacred nature of the area. Similarly, requiring permits for or restricting the areas in which herb, material, and wood gathering are allowed can make it significantly more difficult, or impractical, to engage in such activities. For example, medicinal plants used by the Navajo migrate and may be found in areas several miles from where they were previously located. Limiting collection to certain areas may result in the unavailability of traditional herbs and plants for periods of time. Similarly, restrictions on areas in which wood may be gathered, permit requirements for gathering, or limitations on the amount of wood that is gathered, may significantly impact the practical availability of these resources to the local Native American population.

To the extent particular archaeological and historical sites are appropriate national monument objects under the Antiquities Act, a reservation of land may not be necessary for, and in fact may be detrimental to, their care and protection. A reservation of land for archaeological sites is unnecessary because of the many laws that exist addressing their protection and management. These laws include the Antiquities Act, 54 U.S.C. §§ 320101 *et seq.*; the Utah Antiquities Act, Utah Code Ann. §§ 9-8-301 *et seq.*; the National Historic Preservation Act, 54 U.S.C.A. §§ 300101 *et seq.*; the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa *et seq.*; and the Native American Graves Protection and Repatriation Act, 32 U.S.C. § 3001, *et seq.* The creation of a national monument will result in greater visitation and potential damage to archaeological sites. As discussed below, increased access and visitation intensifies the risks to archaeological resources and does not further their protection. Introducing thousands of unsupervised visitors into an area containing vast amounts of archaeological resources, both inventoried and uninventoried, that are incapable of being physically protected, will result in large amounts of irreparable resource damage and therefore be antithetical to the purpose for which the monument was declared.

A reservation of land is improper for unknown sites. The Antiquities Act was never meant to apply to unknown objects or to allow for large, landscape level reservations. It is impossible to reserve the smallest area compatible with the care and management of an object when what the object is or where it is located is unknown. As of early 2017, there were approximately 8,480 known archaeological sites in the Bears Ears National Monument and approximately 27,734 known sites county wide. Accordingly, the assertions regarding 100,000 archaeological sites are merely estimates of the number of sites that may exist. Approximately nine percent of the land within the Bears Ears National Monument's boundaries has been inventoried, meaning that around ninety percent of the monument has not been inventoried and unknown archaeological sites in uninventoried areas cannot be used as the basis of a reservation.

Regardless of whether such items are properly designated under the Antiquities Act as national monument objects, a reservation of land is unnecessary to protect geologic features. The agencies' existing authorities and management activities, combined with a withdrawal of land, serve to protect and manage geologic features. The principal interest associated with geologic features is their visual appeal and the primary threat is mineral development. BLM and Forest Service manage scenic areas to preserve their aesthetic qualities. The BLM's Record of Decision and Approved Resource Management Plan for the Monticello Field Office ("2008 Monticello RMP"), which covers the Monument lands, prescribes management to protect visual and ambient qualities and control recreational uses. Under the 2008 Monticello RMP, "[a]ll permitted activities must comply with VRM management class objectives, unless a waiver, exemption, or modification is granted by the Authorized Officer" or an exception set forth in the RMP applies.[14] The BLM manages all WSAs, Valley of the Gods, Indian Creek, Dark Canyon Suitable River Segment, Colorado River Suitable Segment 3, San Juan River Suitable Section 3, and San Juan River Suitable Segment 5 as visual resource management ("VRM") Class I, meaning that management objective for these areas is "to preserve the existing character of the landscape." In these areas, "very limited management activity" is allowed and "[t]he level of change to the characteristic landscape should be very low and must not attract attention." The BLM also manages Lavender Mesa, Shay Canyon, portions of the San Juan River, Colorado River Suitable Segment 2, non-WSA areas with

[14] 2008 Monticello RMP, p.149.

wilderness characteristics, and other areas as VRM Class II.[15] The management objective for these areas is "to retain the existing character of the landscape." In Class II areas, "[t]he level of change to the characteristic landscape should be low" and management activities "should not attract the attention of the casual observer." All visual changes are required to "repeat the basic elements of form, line, color, and texture found in the predominant natural features of the characteristic landscape." Under the Forest Service's current management plan, the Forest Service manages land in accordance with Visual Quality Objectives that dictate the protection to be afforded to various areas within the Monument. Under the Forest Management Goals within the Land and Resource Management Plan: Manti-LaSal [sic] National Forest ("Forest Service LRMP"), the Forest Service sets a goal to "[m]aintain, enhance, and/or rehabilitate visual resources to the planned [Visual Quality Objectives]."[16] A withdrawal of mineral development in geologically scenic areas will prevent any extraction of the geologic resources and thereby provide for their protection. A full reservation of the land and a restriction on uses of the land, on the other hand, is unnecessary to protect the geologic features.

Finally, a reservation is unnecessary to protect paleontological resources. The Paleontological Resources Preservation Act, 16 U.S.C. § 470aaa protects paleontological resources, which include with limited exceptions, "any fossilized remains, traces, or imprints of organisms, preserved in or on the earth's crust, that are of paleontological interest and that provide information about the history of life on earth." The BLM and Forest Service are required to "manage and protect paleontological resources on Federal land using scientific principles and expertise." Other than as allowed by the Paleontological Resources Preservation Act, "a paleontological resource may not be collected from Federal land without a permit issued . . . by the Secretary." A reservation of land under the Antiquities Act is unnecessary and redundant of protections and management imposed by the Paleontological Resources Preservation Act. Disclosing the location of these resources, moreover, endangers them and subjects them to increased risks of theft or damage.

4. Congress did not Repeal the *Midwest Oil* Reservation Doctrine Only to Allow a Larger, Unconfined Reservation Authority to Remain in the Antiquities Act

Interpreting the Antiquities Act to allow for a reservation of land to care and manage objects that are not of significant or important scientific interest and other large landscapes essentially resurrects the *Midwest Oil* doctrine, a general withdrawal authority, which was expressly revoked by the Federal Land Policy and Management Act.

In the context of public lands, *U.S. v. Midwest Oil*, 236 U.S. 459 (1915) recognized and discussed the nature of the President's implied authority to withdraw property for various purposes. In *Midwest Oil*, despite a statute stating that all public lands were free and open to oil and petroleum exploration and development, the President issued an order temporarily withdrawing public lands in California and Wyoming from oil exploration and production. 236 U.S. at 466-67. The United States sued Midwest Oil Company to recover for oil that was produced from a claim made after the withdrawal was proclaimed. *Id.* at 467. Although the Court did not "consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase," the Court addressed whether other grounds existed to validate the withdrawal. *Id.* at 469.

[15] 2008 Monticello RMP, p.149-50.

[16] Forest Service LRMP, p. III-2; *see also* p. III-17.

The court noted that "hundreds of these orders have been made" since the earliest periods of the nation's government, which affected an "aggregated millions of acres." *Id.* at 469-70. These withdrawals were not based upon "any general or special statutory authority," and "no statute empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated." *Id.* at 470-71.

The court further explained the nature of the withdrawals, and Congress' acquiescence in the proclamations, stating:

> But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice . . ..

Midwest Oil Co., 236 U.S. at 471. Accordingly, "[b]oth officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." *Id.* at 472-73. "[I]n determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,-even when the validity of the practice is the subject of investigation." *Id.* at 473.

The court explained, however, that although a President cannot "by his course of action, create a power," "the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands." *Midwest Oil Co.*, 236 U.S. at 474. The court therefore concluded that the Presidential withdrawal of lands from oil production was appropriate and within the President's power, as acquiesced by Congress, stating

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

Id. at 475.[17]

At issue in *Midwest Oil* was only a temporary withdrawal in aid of legislation. *See* 236 U.S. 475-77. The court's analysis, however, discussed permanent reservations as well as withdrawals, stating, "if the power involved in making a reservation could differ from that exercised in making a withdrawal,-then the Executive practice and congressional acquiescence, which operated as a grant of an implied power to make permanent reservations, are also present to operate as a grant of an implied power to make temporary withdrawals." *Id.* at 478.

With respect to the character of Congress' acquiescence, the court noted that Congress did not take any action "which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest." *Midwest Oil*, 236 U.S. at 479. The court looked to the nature of the interests affected and the length of time that had passed, stating, "Considering the size of the tracts affected and the length of time they remained in force, without objection, these orders by which *islands, isolated tracts, coal, phosphate, and oil lands were withdrawn in aid of legislation*, furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw." *Id.* at 479-80. The court further noted a report provided to Congress identifying a significant number of withdrawals made without statutory authority, but pursuant to "a right to take such action in the public interest "as exigencies might demand . . .'" *Id.* at 480-81. The court reasoned that, "Congress, with notice of this practice and of this claim of authority, received the report," but did not "ever repudiate the action taken or the power claimed." *Id.* at 481. Accordingly, "Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *Id.*; *but see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989), *superseded by statute other grounds as stated in CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008)).

Congress, however, revoked its implied consent to withdrawal authority by enacting FLPMA. FLPMA § 704(a) provided that, "[e]ffective on or after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) . . [is] repealed . . .." FLPMA did not, however, repeal the Antiquities Act or its withdrawal authority. The enactment of FLPMA strongly supports the argument that, in repealing the *Midwest Oil* doctrine, Congress intended to grant the President something less than the general withdrawal authority recognized in *Midwest Oil* by instead delineating the specific situations in which reservations are appropriate. An expansive interpretation of the Antiquities Act that essentially allows the President a generalized and uncabined authority to reserve vast swaths of land so long as something located upon those lands is deemed to be of historic or

[17] Although *Midwest Oil* was superseded by FLPMA, the Department of the Interior has in the past asserted that Congressional acquiescence can be "regenerated," and that the President continues to have the authority to make withdrawals in accordance with *Midwest Oil*. *See* Office of Legal Counsel, U.S. Dep't of Justice, *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, *12 (Sep. 15 2000). The United States Attorney General's office, however, was "unconvinced" and concluded that "we think it likely that a court would find that § 704(a) of the FLPMA prohibits the President from relying on the implied *Midwest Oil* authority to withdraw lands, regardless of where those lands are located." *Id.* at *13.

scientific import, essentially restores a power that was expressly removed from the President by Congress.

II. Factual Background and Analysis

1. A Diminished Monument Will Provide Greater Protections of Native American Antiquity Sites Both On and Off the Monument

Utah hosts two large landscape national monuments created since 1996, Grand Staircase-Escalante National Monument and Bears Ears National Monument. Both national monuments were created without the support of local elected officials and vastly exceeded the scope of national monuments as intended by the Antiquities Act. Utah supports efforts to reign in abuse of the Antiquities Act and to protect scientific, historic and cultural resources with appropriately-sized land designations.

There are several existing laws expressly intended to protect Native American antiquity sites from desecration, looting and defacement. These include the Antiquities Act, the National Historic Preservation Act, the Archeological Resources Protection Act and the Native American Graves Protection and Repatriation Act. Problems have arisen because these laws have not been properly enforced due to inadequate funding, resources and manpower. Without an increase in enforcement efforts, the Bears Ears National Monument designation will do nothing to further the conservation of archaeological sites and will instead harm these sites and objects. The larger the monument the more difficult the enforcement. It is not only the size of the national monument, however, that impacts enforcement , but also that the very fact of proclaiming the Bears Ears National Monument will place at greater risk the resources it purports to protect. A diminished national monument will better address these risks. First, a smaller size would allow archaeological resources to be appropriately managed by identifying an area containing significant sites for public experience and enjoyment while also being physically protected from damage and vandalism. Second, by directing visitors to a smaller area with appropriate facilities that can be appropriately managed and protected, a smaller monument will relieve the pressure on and exposure of archaeological sites and other resources located outside the diminished monument. Third, a diminished monument managed by the National Park Service will allow the BLM and Forest Service to direct their limited resources to increasing enforcement of existing laws rather than taking on additional management responsibilities that are outside of their expertise. Finally, a diminished national monument will allow limited BLM and Forest Service resources to be properly conserved for other pressing needs such as wildfire, invasive species, biodiversity, climate change, and other resource concerns.

National monument designations bring with them a significant increase in visitation and a significant increase in the risk for damage and vandalism to archaeological sites. National monument designations do not further the protection of Native American cultural sites and resources. As discussed by Utah's Governor, Gary R. Herbert, in testimony before the U.S. Senate Committee on Energy and Natural Resources,

> In 2015, the Grand Staircase-Escalante had 1,400 reported cases of vandalism. According to the BLM, there have been only 25 cases of vandalism reported in the Bears Ears region since 2011. That means the Grand Staircase, with its monument designation, currently experiences 140 times the rate of vandalism as does the Bears Ears region.

> Please do not misunderstand me: a single case of vandalism in this area is too much. But the point remains, if we wish to protect and preserve this area, drawing lines on a map that will encourage increased visitation without a corresponding increase in law enforcement and land management resources is not a solution to vandalism and desecration problems. Indeed, it will like [sic] worsen them.

Accordingly, the action that will most certainly put these cultural sites at greater risk, sites which have been preserved because of their remote location and lack of visitors, is to invite unsupervised visitors to an un-policed area where enforcement of existing land use protections are sorely lacking. A diminished monument that is capable of being physically protected and vigorously managed will provide more protection to sensitive archaeological resources than will a large monument that is incapable of being managed in a way as to handle the increased visitation that accompanies a national monument designation.

Archeological studies worldwide reflect the fact that greater access to and visitation of antiquity sites leads to greater, not less, desecration. This phenomenon has been found to occur on existing national monuments in the Southwest. A 2009 study of factors contributing to antiquity site desecration and defacement at Canyon de Chelly National Monument in Arizona[18] found that the greatest contributors were increased access together with its corollary, increased visitation. A 1997 paper that considered the impacts of the creation of the Grand Staircase-Escalante National Monument on archeological sites within the monument[19] confirmed the effects of increased visitation, concluding that: "Increased visitation significantly accelerates impacts to archeological sites." This problem is greatly exacerbated by the sheer size of the monuments and the number of antiquity sites. A 1987 GAO Report[20] looked at the problems associated with protecting archeological sites in the Four Corners area. It recognized that, given the vast area and number of sites, it is virtually impossible to provide any type of physical protection. It also identified the several laws already in pact that make looting and desecration a crime. The problem with the enforcement of these laws is with staffing and funding levels, not with whether it is a monument. While larger staffs may improve enforcement, it will remain impossible to truly protect the thousands of sites if access or visitation is dramatically increased. More people will always mean more looting and desecration.

Second, removing land from the Bears Ears National Monument reservation and directing visitors to smaller areas capable of physical protection will help protect the archaeological resources in that area by reducing visitation to those sites. The 1997 paper mentioned above made several suggestions for managing the Grand Staircase-Escalante National Monument so as to reduce harm arising from visitation attendant to the monument designation. The author of that article suggested developing "appropriate sites" and, after excavating those sites, promote those sites for visitation while reducing access to the remaining sites. The author noted that "visitors who have enough opportunities to visit interesting archaeological sites (that are developed and can sustain high levels of visitation) are less likely to visit more remote, undeveloped sites that are not able to withstand high levels of use without incurring significant damage." An appropriately large and diverse number of sites should be

[18] Laris, J., *A Perfect Pothunting Day* (2009).

[19] Tipps, B., *Archeology in the Grand Staircase Escalante National Monument: Research Prospects and Management Issues* (1997).

[20] GAO, *Problems of Protecting and Preserving Federal Archeological Resources* (1987).

developed and the sites must be developed in a way to provide a satisfactory visit. As explained by the author, satisfaction "depends on the developed sites being made easier, more enjoyable, and more rewarding to visit than undeveloped sites" and important factors include "[p]roviding toilet facilities, places to rest along the path to the site, and good vantage points for photographs." Another factor mentioned by the author is a sense that the site is pristine and undeveloped. In addition to increasing access to the designated developed sites, access should be restricted to the other sites to assist with their preservation.

The article suggests other means of protecting the archaeological sites designated for preservation, including declaring vast areas of wilderness, limiting group sizes, requiring permitting, fencing archaeological sites, and discouraging access. Many of these suggestions were incorporated into the Grand Staircase-Escalante National Monument resource management plan, which ultimately reduced access to the monument by the vast majority of visitors by creating *de facto* wilderness. This approach is heavy-handed and extreme and may interfere with use of the monument by particular groups such as Native Americans and active management to protect monument resources. In the Grand Staircase-Escalante National Monument, for example, without a permit, groups over 25 people are allowed in only four percent of the monument, and in sixty-five percent of the monument group sizes are limited to twelve people. Fuel wood harvesting is only allowed in two very small areas and collection of natural materials by Native Americans is allowed only pursuant to a BLM permit. Active management has been nearly non-existent in many places within the Grand Staircase-Escalante National Monument. One of the most popular destinations, a trailhead to several slot canyons, does not have facilities to accommodate visitors and the BLM has refused to install such facilities based on management decisions contained in the monument management plan. The rangeland and biotic health of other areas has deteriorated and resulted in decadent foliage, soil erosion, and a loss of biodiversity. Instead of imposing *de facto* wilderness management across the nearly 1.5 million acres in the Bears Ears National Monument, which, as discussed above has been ineffective at preventing damage to archaeological sites within the Grand Staircase-Escalante National Monument, it is likely that the same goal of discouraging access can be met by merely removing those areas as a tourist destination by not designating them as a national monument and at the same time increasing law enforcement activities within the Present Monument boundaries.

Third, a diminished monument managed by the National Park Service will allow the BLM and Forest Service to direct their limited resources to increasing enforcement of existing laws rather than developing a new management plan. The Antiquities Act grants no authority whatsoever for the President to fund the national monument designation. National monument designations do not automatically result in funding and at least one member of Congress has proposed refusing to fund the Bears Ears National Monument. What limited funding available for the land and resources in the Bears Ears region will likely be applied to preparing the management plan and regulations mandated by the proclamation, not enforcing existing laws. No amount of additional regulation will protect the resources without enforcement of existing laws that more than adequately protect the resources.

The BLM lacked sufficient resources to manage the Bears Ears area before it became a monument and the monument designation will do nothing to encourage use of the available resources for resource protection. The BLM's resources are limited such that as of 2016, only 49% of designated national monuments and national conservation areas were "inventoried for the resources, objects, and

values for which they were designated."[21] The BLM's and Forest Service's performance in the Bears Ears region with respect to identifying all archaeological sites is even more limited, with around 90% of the land remaining uninventoried for archaeological resources.

Recent testimony from Utah Governor Gary Herbert highlights the limited resources available to protect the Bears Ears area. In that testimony, Governor Herbert noted that as of late 2016, the Bears Ears region had only two full time officers to protect approximately 1.9 million acres the area's resources. Rhode Island, which is approximately 40% the size of the entire Bears Ears region, had 93 troopers (a number that does not include administrative staff or special agents). The entire budget for the BLM's National Conservation Lands System, which includes 50,000 square miles of land, was only $64 million. On the other hand, the Providence, Rhode Island police force, which is responsible for protecting 20.5 square miles, had a 2015 budget of $69 million.

Finally, a diminished national monument will allow the resources to be properly conserved and actively managed to address wildfire, invasive species, biodiversity, climate change, and other resource concerns. If even a fraction of the hundreds of common items mentioned in the Bears Ears National Monument proclamation are deemed to be protected national monument objects, the federal agencies may choose to manage the Bears Ears National Monument as *de facto* wilderness and forego active management necessary to address insect infestations, fire hazards, rangeland deterioration, and other problems present in other portions of the state. Grand Staircase-Escalante National Monument lands have been mismanaged in ways that harm resources within the monument. Because the Grand Staircase-Escalante National Monument has in large part been managed as *de facto* wilderness, minimal active or adaptive management has taken place, which has caused resources within the monument to deteriorate. As acknowledged in the Utah legislature's resolution requesting that the Grand Staircase-Escalante National Monument be reduced, "the designation of lands as monuments has reduced the ability to actively manage for land health issues such as vegetation treatments, erosion control, water management, grazing management, wildlife management activities, and invasive plant control."[22] Issues in the Grand Staircase-Escalante National Monument, and expected in the Bears Ears National Monument, include invasive species, poor rangeland health, loss of animal habitat, soil erosion, loss of biodiversity, increased catastrophic wildfire hazards, and relegation of the land to single-use recreation in most areas of the monument. These hazards not only impact the aesthetic qualities of the monument area, but also increase the risk to archaeological and other monument resources.

2. Native American Concerns Focus On Protection of Cultural Sites and Continued Access for Traditional Uses of the Lands in the Bears Ears Region.

Native American perspectives and interests have rightfully played a significant role in the debate of the Bears Ears Monument. Not surprisingly, within the Native American community there is no consensus as to either the Present Monument or whether there should be some modification. There is no dispute, however, regarding the great significance of the Bears Ears "place" and the larger Bears Ears region to the cultural, ancestral, spiritual and domestic interests of Native Americans throughout the

[21] Bureau of Land Management, *Budget Justifications and Performance Information, Fiscal Year 2018*, III-5.

[22] H.C.R. 12, *Concurrent Resolution Urging Federal Legislation to Reduce or Modify the Boundaries of the Grand Staircase-Escalante National Monument* (Jan. 26, 2017).

Four Corners region. As with the public at large, the questions and disagreements revolve around how best to preserve and protect these Native American interests.

A recent publication examines the relationships between contemporary Native Americans and the ancestral Puebloans, or Anaasazi, that occupied the Four Corners region in the Pre-Columbian period between approximately 700 and 1300 CE. In his book *Viewing the Ancestors; Perceptions of the Anaasazi, Mokwic, and Hisatsinom* (2014), Professor Robert S. McPherson examines the cultural and spiritual relations with and attitudes toward these "Ancient Ones" and their evidences by contemporary Navajos, Utes, Paiutes, Hopis, and Zunis, with particular focus on the Navajo. He addresses the difference between the Native American sense of place and that of the Anglo as follows:

> *The chief difference between the man of the Archaic and traditional societies with their strong imprint of Judeo-Christianity lies in the fact that the former feels himself indissolubly connected with the Cosmos and the cosmic rhythms whereas the latter insists that he is connected only to history.*

Regarding the significance of the Anaasazi sites and objects McPherson concludes:

> *In summary, the Navajo use of Anaasazi sites and objects plays an important part in religious beliefs. Although on the surface it appears that they are simply and systematically being avoided, in reality the ruins have significant use by those who are ritually prepared to enter them. Extreme respect encouraged by the presence of supernatural powers separates these sites from everyday use and allows them to be special places where aid is obtained. When the Anaasazi left their homes and artifacts behind, they unwittingly bequeathed them to the {Navajo}, as willing caretakers. Steeped in religious beliefs, the {Navajo} utilized, yet unconsciously preserved, the Anaasazi heritage. Now some of the responsibility has passed on to whites, whose orientation is not toward the supernatural but toward the physical. Time will show whose approach was most successful in preserving the Anaasazi legacy. In the meantime, Anaasazi sites remain places of connection to the past that provide powers for today.*

Again, it is not a question of whether Native Americans want the antiquity sites protected—they uniformly do. As stated in the previous section, however, greater protection will not come from the Present Monument. Greater protection will result from a combination of a diminished monument containing only as many sites as can be physically protected from greatly increased visitation, together with increased enforcement of existing laws in the areas outside of the diminished Monument.

The concerns of the local Native American community go beyond the protection of archeological sites. There are numerous present-day uses of the Bears Ears region that deserve at least equivalent consideration. Traditional uses of the lands for ceremonial purpose, gathering of medicinal herbs and plants, hunting, livestock grazing and wood gathering are among the uses that should be facilitated both inside a diminished monument and throughout the Bears Ears region. These uses are critical to ways of life. For instance. Some eighty percent of Navajo homes rely entirely upon firewood for year-round heating and cooking. This means that access to the lands for Native Americans' traditional and domestic purposes and uses must be insured both inside and outside of the monument.

Continued open access and use of land within the Present Monument for traditional uses is a matter of utmost importance to local Native American communities. A diminished monument will most appropriately address and allow traditional uses to continue, whereas the expansive nature of and landscape reservation made by the Proclamation will likely significantly limit the ability of Native Americans to continue their traditional uses of lands within the Present Monument.

Unfortunately, national monument designations often result in limited access to the national monument land. The Bears Ears National Monument proclamation prohibits the creation of "additional roads or trails designated for motorized vehicle use" unless they are for public safety purposes or for protecting monument objects. In addition, motorized and mechanized vehicle use is not allowed, except on designated trails. This may serve to limit Native Americans' ability to collect wood by limiting the areas in which they can use motorized or mechanized vehicles to transport any wood that may be cut. In addition, monument designation often results in the closure of roads. Monument managers for the Grand Staircase-Escalante National Monument closed vast numbers of roads claimed by Utah as R.S. 2477 roads within the monument boundaries, which limited access to many areas of the monument. The vast majority of the Grand Staircase-Escalante National Monument has been designated as primitive or outback and onerous rules in the land use plan strictly limit the activities available to most monument visitors.

The Proclamation's vast catalogue of plant and animal resources raises questions regarding the extent to which these items will be available to Native Americans for continued use. Due to their traditional lifestyle and impoverished conditions, many of the local Native American communities rely upon wood collected within the Present Monument to heat their homes over the winter. Similarly, the local populations use many of the herbs naturally occurring within the Present Monument in their ceremonies and for medicinal purposes. The Proclamation, however, itemizes the clear majority, if not all, of these resources. Experience has shown that any item mentioned in the proclamation will be argued by special interest environmentalists to be national monument objects that must be preserved and protected. To the extent wood, herb, and traditional plant resources mentioned in the Proclamation are deemed national monument objects, it is likely that the Native Americans' use of these resources will be significantly limited and perhaps rendered nugatory by the creation of a landscape monument.

III. Features of Diminished Monument

1. Diminished National Monument Reservation

A diminished national monument should contain sites that are of interest to monument visitors and that exemplify the types of sites present in the Bears Ears region. The area designated as a monument, however, needs to be capable of being physically protected to reduce the damage and vandalism to the present sites. The land within the monument must ensure continued access to Native Americans for traditional uses, including traditional cultural, spiritual, and material needs. In addition, for public health and resource protection, the monument must have appropriate facilities to accommodate visitors, including restroom and parking facilities and potentially developed camping areas. In addition, although mineral extraction activities are not a threat and are not expected to occur in the area currently designated as the Bears Ears National Monument, a reservation of the mineral resources in the area surrounding the monument will ensure that no mineral or energy exploration, development, or extraction activities degrade or threaten any monument resources.

To achieve the above objectives, a diminished national monument could extend along Utah Highway 95 and include the following features: the Bears Ears buttes, which have significance to Native American groups and were the primary feature identified by those supporting the monument, Butler Wash Ruins, Tower Ruins, Arch Canyon, North Mule Canyon, and South Mule Canyon. The Mule Canyon area contains the House on Fire ruin and the Wall Ruin, along with other structures. These areas are easily accessible by roads, are either outside or close to areas outside of wilderness study areas, have potential for installing appropriate facilities, and can be more effectively protected from damage and vandalism. The smaller monument area also limits the potential conflicts between Native American uses and the national monument designation. As discussed above, limited access and management restrictions may hinder Native Americans' traditional uses. By limiting the size of the reservation, the potential for these conflicts is avoided and their use is less likely to be regulated.

2. Mineral Withdrawal

In addition to the diminished national monument, a mineral reservation may be appropriate to address concerns regarding mineral exploration, development, and extraction and the impact those activities may have on the resources within the area. Accordingly, a mineral withdrawal is proposed to preclude mineral development around the national monument. The outline for the mineral withdrawal incorporates areas of interest within the Present Monument. These items include the Bears Ears buttes and headwaters, Lime Ridge Clovis Site, Moon House Ruin, the birthplaces of K'aayelii and Hastiin Ch'ihaajin (Manuelito), Comb Ridge, San Juan River, Cedar Mesa, Valley of the Gods, Hideout Canyon, Arch Canyon, Mossback Buttes, Beef Basin, and portions of Elk Ridge. The boundary of the mineral withdrawal was drawn to track natural features, roads, watersheds, and management units so as to make the boundaries readily apparent from the ground and to improve management efficiencies.

3. Increased Enforcement

The diminished national monument must be accompanied by an increase in law enforcement activities in the greater area surrounding the Bears Ears buttes. Law enforcement has been sorely lacking in the area and the sheer size of the region prevents physical protection of national monument resources. To appropriately protect the archaeological resources in the area, then, greater law enforcement in the

form of more rangers and patrols, more visibility of enforcement activity, active monitoring of resources, and education regarding restrictions is necessary to protect the resources.

4. National Recreation Area

Although it is not appropriately designated as a national monument, the Indian Creek and Lockhart Basin area is of significant concern to outdoor recreationists as it is a premier destination for outdoor recreationists. Second only to Yosemite, the climbing routes in this canyon are visited by thousands of people from around the world. Super Crack Buttress is an iconic climbing route. Lockhart Basin is to the north of Indian Creek and is a continuation of the same canyon area contained in Canyonlands National Park. Access to the area is strictly limited and is primarily achieved through Indian Creek. The routes within the basin area used by recreational motorcyclists, jeeps, and OHV users. This area is one of the most important areas to the outdoor recreation industry in terms of the campaign to designate the Bears Ears National Monument. Patagonia, which sells outdoor recreation equipment and has spent significant funds advocating for the Present Monument, would likely deem Indian Creek to be of utmost importance.

Creating a recreation area, which may be managed primarily for recreational purposes rather than preservation, will allow for more flexibility in managing the area for multiple recreational uses than would creating a national monument. Appropriate facilities, including restrooms, trails, camping areas, and access routes, could be more easily created and managed within a recreational area. Moreover, designating the area as a National Recreation Area is more legally defensible than creating a national monument, as the Indian Creek area contains far fewer archaeological resources and is essentially a scenic landscape reservation.

5. Revised National Monument Name

Local Native Americans have expressed their desire to change the name of the national monument in light of the controversy it represents and the division it has created within the tribes. Local Native Americans have proposed naming the diminished national monument the Chief Manuelito National Monument.